No. 248.

Brf. of Conrad for Appellee.

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JAMES H. McKENNEY

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES,
Appellant,
v.
EDWARD A. MOSELEY,
Appellee.
} No. 248.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, Appellant, *v.* EDWARD A. MOSELEY, Appellee.	No. 258.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Edward A. Moseley, who is the secretary and the disbursing agent of the Interstate Commerce Commission, laid before the "Auditor for the State and other Departments" his accounts and vouchers, as such disbursing agent, for the several quarters of the years 1898 and 1899, as set forth in his petition, and the auditing officer disallowed items aggregating in amount $310.37, being for telegrams sent on the official business of the Commission.

The disbursing agent, who is appellee here, paid this amount, so disallowed, as a credit in his accounts, into the Treasury, and brought this suit to recover it.

The Court of Claims gave judgment for the full amount so demanded; and from that judgment this appeal is taken by the United States.

It is due to the legal adviser of the Government to say that we believe this appeal to be taken, not because of any doubt as to the validity of the claim, or as to the propriety of the judgment therefor, but because the views entertained and enforced by the Comptroller of the Treasury as to the power and duties with which he is clothed by law have become so radical and extreme as to excite grave antagonism on the part of some of the Executive Departments of the Government, and seriously to impair the usefulness of his office. It has therefore become necessary that there should be a definition by this Court of the large powers which the Comptroller claims have been conferred upon him by the statutes under which he performs the duties of his office.

The question presented in this case is as to the power of the Comptroller to require the disbursing agent of the Interstate Commerce Commission to produce before the auditing officers of the Treasury, with his vouchers for items of disbursements for telegrams sent on the official business of the Commission—

"Copies of all telegrams for which such charge was made, or to furnish a certificate that such telegrams are of such a confidential nature, that to file them with the account would be prejudicial to the public interest, and, in default of producing them, to disallow the agent credit in his accounts for the amounts so disbursed by him."

It will be seen from the findings of Fact No. III (Record, p. 17) that this requirement was fully complied with, except as to disclosing the actual contents of the telegrams; and it will be further seen from No. II (Record, p. 17) that even these were offered for inspection at the office of the Commission.

Indeed, the findings of fact in this case (Record, pp. 16–18) leave no room for doubt as to the full and hearty compliance by the appellee here, with every requirement of the Comptroller, as far as it was possible for him to do so; and in his application of October 4th, 1900 (Record, p. 12), to the Comptroller, to reconsider the ruling of the Auditor in disallowing the items for telegrams, this appellee said:

"With the merely abstract question of the reasonableness or unreasonableness of the rules and regulations adopted for the government and conduct of your office, I have nothing to do. Against your

attempted application, however, of such rules and regulations to my official conduct and especially the reiterated attempts to require of me the production of papers that are not within my control, and which I am prohibited by the Commission whose agent I am, from disclosing to the scrutiny of all the employees in the accounting office of the Treasury, I do protest, and again refer the matter to that sense of propriety and justice which should be the guide of all official action."

ARGUMENT.

THE REGULATION REQUIRING THE DISBURSING AGENT OF THE INTERSTATE COMMERCE COMMISSION TO PRODUCE WITH HIS VOUCHERS, COPIES OF THE TELEGRAMS, WAS IN VIOLATION OF THE STATUTES PRESCRIBING HIS DUTIES.

The "Act to Regulate Commerce" as amended March 2, 1889, Sec. 7, Chapter 382 (1 Supp. R. S., p. 690), provides:

> "All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the City of Washington, *shall be allowed and paid on the pre-*

sentation of itemized vouchers therefor approved by the Chairman of the Commission."

And the appropriation act of the same date (1 Supp. R. S., p. 698) provides:

> "That hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury."

By this legislation it is made the duty of the disbursing agent to "allow and pay" all expense accounts presented to him which are supported by "itemized vouchers therefor approved by the Chairman of the Commission."

The statute gives the disbursing agent no other discretion in the allowance and payment of such accounts, than to ascertain the facts that the account is supported by "itemized vouchers" and that these have been "approved by the Chairman of the Commission." It does not authorize him to inquire whether the expense for which the charge was made was in fact "necessary," or whether the "business" charged for was in fact, "official." All these matters are under the Act of Congress for the Chairman of the Commission to determine. Itemized vouchers approved by the Chairman of the Commission, when presented to the disbursing agent of the Commission, must be "allowed and paid" by him when satisfied as to their authenticity.

The appropriation act approved July 31, 1894 (2 Supp. R. S., p. 214), contains the provisions under which the accounting division of the Treasury was readjusted; many offices were abolished, and their duties distributed. By sec. 4, pages 212 and 213, the office of "Comptroller of the Treasury" was created, and it was provided that—

> "He shall perform the same duties and have the same powers and responsibilities (except as modified by this Act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this Act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury."

Sec. 5 (p. 213) provides that—

> "The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom."

Sec. 7 (p. 214) provides that—

> "Fifth. The Auditor for the State and other Departments shall receive and examine all accounts of salaries and incidental expenses of the offices of * * *

Interstate Commerce Commission. * * * He shall certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate according to the character of the account, to the Secretary of the Senate, Clerk of the House of Representatives * * * or the Chief Officer of the Executive Department, Commission, board, or establishment concerned. * * * "

Sec. 8 (p. 215) provides that—

"The balances which may from time to time be certified by the Auditor to the Division of Bookkeeping and Warrants, * * * shall be final and conclusive upon the Executive Branch of the Government, except that * * * the Comptroller of the Treasury may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon revision shall be final and conclusive upon the Executive Branch of the Government."

These are, substantially, all the powers conferred by statute upon the Comptroller applicable to the matter here in hand. The expenses of the Interstate Commerce Commission are to be audited by the proper accounting officer of the Treasury.

But, what is involved in such "auditing?" What requirements can these accounting officers impose upon the disbursing agents whose accounts may be before them to be audited? Can the Comptroller, under the power conferred upon him to "prescribe the forms of keeping and rendering all public accounts," impose upon the disbursing agent of the Commission, duties inconsistent with those which are laid upon him by statute?

The act of March 2, 1889, supra, provides that all of the expenses of the Commission "* * * *shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Chairman of the Commission.*"

The Comptroller has prescribed a rule and enforced it in some cases by his decisions, and has disallowed the items of expenditure for telegrams in the accounts of this disbursing agent—

> "because of failure to furnish copies of all telegrams for which charge is made or to furnish a certificate that such telegrams are of such a confidential nature that to file them with the accounts would be prejudicial to the public interests." (Record, p. 9.)

To the application of this rule to him, the disbursing agent of the Commission objected, on the grounds—

(1) That the statute in express terms required him to pay all expenses of the Commission which were supported

by "itemized vouchers therefor, approved by the Chairman of the Commission"—that these were the *only* vouchers he had to lay before the accounting officers.

(2) That the original telegrams, vouchers for which were produced by the disbursing agent, were not under his control, but were by the express order of the Commission preserved among the private files of its office, so that the disbursing agent had no power of his own to produce them, or copies of them, had he desired to do so.

(3) That the Commission had on April 27, 1899, made and issued an order on the subject of the Comptroller's demand, as follows:

> "That so much of the Comptroller's communication as requires copies of telegrams relating to the business of the Commission, to accompany telegraph vouchers for which credit is asked, be disregarded by the Secretary and disbursing agent—the Commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest."
>
> (Finding of Fact No. II, Record, p. 16.)

(4) That in requiring the disbursing agent to allow and pay all expenses of the Commission, as appeared by item-

ized vouchers approved by the Chairman, Congress had plainly manifested the intent and purpose of making the Chairman of the Commission—and not its disbursing agent—the sole judge and arbiter as to the legality and the propriety of the expenditures, and that an account made up of items of amounts due to specified persons, when approved by the Chairman of the Commission, should be paid by the disbursing agent without further investigation or scrutiny by him.

(5) That while the Commission had prohibited the disbursing agent from producing before the accounting officers of the Treasury the telegrams sent on the business of the Commission, because they were "confidential," yet had the Commission, by its communication to the Comptroller of October 4, 1900, invited the officers and agents of the accounting division to make examination of such telegrams "in the offices of that Commission," and there satisfy themselves as to the subject matter of such telegrams.

(Finding of Fact, No. II, Record, p. 17.)

These considerations failed to impress the Comptroller, to whom they were addressed, and he adhered to his view; but they did not fail to persuade the mind of the Court of Claims, which accordingly found upon the law in favor of the Claimant.

The Commission, as we have seen, held that *all* of its telegrams, which were embodied in the accounts of the disbursing agent, were *confidential*, and that for that reason should not be exposed to the view of the clerks in the accounting division of the Treasury. But the Comptroller appears to have been unwilling to accept this formal, official certificate of the Commission as binding upon him; and hence in his communication of July 23, 1900, he made this remarkable criticism upon it:

> "It will be observed that the order is applicable, not to any telegram in particular, but to all telegrams —to those that had been sent at the time the order was made, and to those that might be sent hereafter."
>
> (Record, p. 10.)

But it will be seen from the order itself (Record, p. 16) that it refers to those telegrams only, for which the disbursing agent had paid, and the vouchers for which had been produced in support of the items, which the Comptroller had declined to allow, because the telegrams were not produced with the vouchers. An attentive scrutiny of the Comptroller's communications will fail to discover any other ground for the disallowance of the items than those which we have considered.

THE POWERS ASSUMED BY THE COMPTROLLER ARE IN EXCESS OF THOSE CONFERRED UPON HIM BY LAW.

The action of the Comptroller in this case is a logical result of the extraordinary powers and functions which he has persistently asserted to be incident to his office. His views as to these assumed attributes of his office are quite fully disclosed in his voluminous official publications, annual reports of the Comptroller of the Treasury, and the published volumes of his official decisions. It is not inappropriate, and is certainly admissible, to refer to these, for the purpose of ascertaining whether the error, which, in our judgment vitiates his conclusion in this case, is not directly traceable to the vice which lurks in his premises.

In the third volume of Comptroller's Decisions, page 236, the Comptroller said:

> "Copies of telegrams have by the long established practice of the accounting officers been required of all officers or employees of the Government, except possibly in some special cases under extraordinary circumstances."

In the fourth volume, page 237, his rule of conduct is stated in full:

> "Some unusual public interest may require the sending of a confidential telegram where secrecy is

a public necessity. In such a case the suppression of such a message would be justified on the ground of paramount necessity. * * * When such an exceptional case presents itself a certificate of the Secretary of War may be accepted in lieu of the message, provided said certificate covers all material points. The certificate should state that the message was actually transmitted, and was confidential, and that it would be prejudicial to the public interests to have it exposed; that it was on public business, and the number of words it contained; whether it was a day or night message; ordinarily the person by whom sent and to whom delivered; the place from which sent and where delivered; whether or not directions were given for its transmission over a bond-aided line; such a showing of the nature of the business upon which the message was sent as will enable the accounting officers to determine the appropriation properly chargeable with the expense; and that the same has not been paid." (4 Comp. Dec. p. 237.)

It may not be out of place to suggest that the Supreme Court does not regard the rule of conduct of the accounting officers, even though of forty years' standing, as affording sanction for overruling the statutes. (United States v. Temple, 105 U. S., 97–99.) Neither a court nor the

head of an Executive Department can establish rules and regulations which are not expressly, or impliedly, authorized by Congress. In Harvey v. U. S., 3 C. Cl. R. 38, that Court held, with reference to such rules:

> "Those words describe rules relating to the subject on which a department acts, and are made by its head under an Act of Congress conferring that power, and thereby giving to such regulations the force of law."

And where the Court of Claims itself had established the rule of procedure, where a claim was presented for adjudication, that the petition must show that application for its allowance had been made to that department in which such claims were ordinarily settled, the Supreme Court held (Clyde v. United States, 13 Wallace, 38)—

> "This was establishing a jurisdictional requirement, which Congress alone had power to establish."

Congress has invested the executive head of the Interstate Commerce Commission with the power of examining the items of proposed expenditures payable out of the appropriations annually made for the expenses of that Commission, and of approving such as in his judgment are proper to be made, and of attesting that approval, and authenticating the vouchers for such items of expenditure by marking the vouchers "Approved;" and Congress has also made it the duty of the disbursing agent of the

Commission to allow and pay all such itemized vouchers when so authenticated. Congress, in like manner, has made the Secretary of the Senate and the Clerk of the House of Representatives the disbursing officers of the two Houses, respectively, and their disbursements are conclusive on the accounting officers of the Treasury; and their reports are made only to the Congress (Rev. Stat., secs. 56, 57, 63). Also, it seems that the allowance of the expenses of the Supreme Court of the United States is not discretionary with the accounting officers of the Treasury, although it does appear from the annual report of the Comptroller of the Treasury for the year ending June 30, 1899, pages 9 et seq., that under the Act of Congress of March 15, 1898 (30 St., 316), providing that—

> "All books, papers, and other matters relating to the accounts of officers of the Government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials,"—

the Comptroller claims authority to supervise such accounts.

The Comptroller, acting upon his construction of this Act, demanded of the Clerk of the Supreme Court of the

United States the production of all such books, papers and other matters in his office, for the inspection by the Comptroller or his agents. With this demand the Clerk declined to comply, and referred the matter to the Chief Justice of the United States, who, after conference with his colleagues, sustained the action of the Clerk. The Comptroller appears to have been unwilling to accept this opinion of the Justices as final and conclusive of the matter, but communicated the entire correspondence to the Secretary of the Treasury, saying,—"I lay all the facts before you as the head of this department in order that you may take such action in the premises as to you may seem right and proper."

The rule of the Comptroller, as it appears above, embraces two classes of official telegrams, viz., the *confidential*, and the *non-confidential*.

As to the non-confidential, he requires that each disbursing officer shall produce with his vouchers for such telegrams the original telegrams or copies thereof; and as to the confidential, that he shall produce the certificate of the head of the department, the characteristics of which certificate are prescribed.

Now consider the reasonableness, and the practicability of this rule.

The official telegrams that are sent out from the Executive Departments are many thousands in number, in

each fiscal quarter. Those of the Weather Bureau alone are so numerous that the rule has been suspended as to it. Those of the War, the State and the Navy Departments frequently extend to great length.

What clerical force would be required to make copies of all the non-confidential telegrams? And as to those that are confidential, what far greater clerical force would be required to frame the lengthy certificates which this rule prescribes? And how much of the time of the heads of departments would be taken up in verifying and signing these certificates? During the late Spanish war, and the trouble in China, the telegrams of the War, State and Navy Departments were numerous and of the gravest character. They were, in the highest degree confidential, yet the rule of the Comptroller would disallow to the disbursing officer the amounts expended, unless the vouchers for expenditure were accompanied by a certificate as to their character by the head of the department.

The fifth Finding of Fact (Record, p. 17) shows that prior to January, 1899, this rule was never enforced as to the Treasury, State, Navy or Postoffice Departments, or to the Interstate Commerce Commission.

It does not affirmatively appear that it has ever at any time been enforced as to any department. But it is altogether unnecessary to rely on this fact for the purposes of this case.

The rule is obviously unwise and impracticable in this, that compliance with its requirements would tend to defeat one of the objects for which the Interstate Commerce Commission was formed. No agency or instrumentality of the Government requires for its efficient operation the exercise of such constant prudence and intelligent discernment as does this Commission. Its duty is—

The ascertainment of the facts that underlie the controversies between common carriers on the one hand and persons and localities on the other. In the investigation of these controversies many agents are employed by the Commission, between whom and the Commission constant communication is maintained. These communications are, obviously, of the most confidential character, involving inquiries into the criminal acts and private conduct of the carriers and of their officers and agents, and they are often conducted necessarily by telegraph. The disclosure of these telegrams to the curious or, it may be, to the covetous eye of the thousands of clerks in the Treasury Department, might inevitably lead to the defeat of the purposes for which the information was sought or obtained, and perhaps subject the parties concerned to pains and penalties. The same reasons that preclude the confidential communications of the Secret Service Bureau from exposure and publication apply with equal force to those of this Commission.

Can the Comptroller by his rule lawfully impose upon the Chairman of the Interstate Commerce Commission the additional and irksome burden of obtaining copies of all the non-confidential telegrams sent out from his office, and of preparing and filing, in respect to each confidential telegram, the certificate which the Comptroller here requires?

The Comptroller appears to be of the opinion that the same rule obtains in the Executive Departments of the Government that exists in the counting room of a private business concern, i. e., that the will of the proprietor is the law of the office. In the annual report of the Comptroller of the Treasury for the fiscal year ended June 30, 1899, page 8, he says:

> "Disbursing officers will from time to time be seasonably warned, where it is found that incorrect methods of accounting are indulged in by them, liable from their continuance to result in loss to the Government; and after such warnings will be expected to conform to the well-settled usages of safe and correct methods of accounting."

Congress may not have been properly advised as to these "well-settled usages of safe and correct methods of accounting" when it authorized and repaired this disbursing agent to pay all such accounts as were sustained by itemized vouchers approved by the Chairman of the Commission,

but it has so enacted, and that is the law. Now, can it be that the Comptroller, because he disapproves of the legislation of Congress in this matter, is invested with revisory power over that legislation and may amend and enlarge it to secure what, in his judgment, may be better results? Can he in the exercise of such power control the discretion of the Chairman of the Interstate Commerce Commission, to whom Congress has confided the duty of determining as to the sufficiency of the vouchers?

The correspondence exhibited with the petition discloses the fact that the Commission and its disbursing agent have not been disposed to stand upon any narrow or merely technical grounds, but have been at great pains to indulge the Comptroller by a full compliance with all of his exactions which are not impracticable or absurd. The Commission by its order (R., 16) has even endeavored to gratify his demands as to the vouchers for telegrams by declaring in the most formal but explicit terms that *all* the telegrams were of a confidential nature and can not for that reason be produced. Yet, despite this substantial compliance with the Comptroller's requirement, that most rigid and uncompromising functionary has persisted inexorably in his contention, until no other course remains to the disbursing agent but to have the Comptroller's objections denounced as "frivolous and vexatious" upon an appeal to this Court. (United States v. Harmon, 147 U. S., 268, 282.)

The Comptroller of the Treasury may revise on his own motion the accounts settled and stated by the Auditor for the State and other departments; and also revise the decisions of the Auditor making an original construction or modifying an existing construction of statutes.

But this power must be exercised with due regard to the existing law, and where the existing law provides one method of accounting, it is not for the Comptroller to require the auditors "to conform to" what he may regard as "the well-settled usages of safe and correct methods of accounting," and where the existing law invests a head of department with the power of "approving" such vouchers as in his judgment are proper, and directs the disbursing agent to pay all such itemized vouchers as are approved by the head of the department, and such agent does, under that direction, pay such items, it is not competent for the Comptroller to hold that—

> "the accounts of the disbursing agent of the Interstate Commerce Commission are, by law, required to be audited *on their merits* by the accounting officers."

Nor that—

> "In the performance of that duty it is necessary to have the same character of evidence in support of vouchers as is required of all other disbursing officers." (4 Comp. Dec., p. 276.)

It is for the Chairman of the Commission, and not for the Auditor or the Comptroller, to determine as to the merits of the accounts, if the items are within the scope of the law. Attention has already been directed to the fact that the two statutes, viz., the Interstate Commerce Act, which provides that "All of the expenses of the Commission shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission," and the act requiring "That hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury," were both approved on the same day, viz., March 2, 1889, and must, therefore, be construed together. They are not repugnant to or inconsistent with each other. One did not repeal or modify the other, but the two must be construed together. (Opinion of Attorney-General McKenna, 21 Atty-Genl. Opinions, p. 604.) One provides for the authentication of the vouchers upon which the disbursing agent shall allow and pay the items of the expenses of the Commission. The other provides that the accounts sustained by vouchers so authenticated shall be audited by the proper accounting officers of the Treasury. With the *merits*, therefore, of the vouchers so authenticated, neither the Auditor nor the Comptroller has anything whatever to do. Nor, for that matter, has the disbursing officer. When so itemized and authenticated he *must* pay them.

They may ascertain whether the vouchers are authenticated as required by law, and they may also see that the Commission has not, in its disbursements, exceeded the amounts to which by law it is limited for certain prescribed objects, but beyond these limitations they can not rightfully pass.

This disbursing agent is, of course, a bonded officer of the government, and gave as he was required acceptable sureties on his official bond. These sureties, it may be reasonably presumed, ascertained before binding themselves what legal obligations they were assuming by their undertaking. They were probably advised that under the law, "the faithful performance of his duties as such disbursing agent," involved the payment by him of only such vouchers as were itemized, and were approved by the Chairman of the Commission. This undertaking they were willing to assume, while they would have declined to undertake for the performance of all such unknown and unascertainable duties as the present and future Comptrollers might impose upon the disbursing agent, in addition to those prescribed by the terms of the statute. The effect of the construction which the Comptroller places upon that statute necessarily is to increase in character and extent the obligations of the sureties beyond those contemplated and secured by the bond.

In the previous case (Moseley v. U. S., 35 Ct. Cl. R., 347),

the facts of which were substantially those of this case, the Court of Claims found for the claimant, but in its opinion it stated the rule established by the Comptroller, and said:

> "Such a requirement is not unreasonable, and I cannot see that it will work any greater inconvenience to the Commission than it does to all the other Departments of the Government."

But by reference to that opinion, it will be seen that the Court did not advert to the feature that distinguished the Commission from the other departments which, as we have shown, is that by the Act of Congress creating the Commission, it is provided that—

> "All of the expenses of the Commission * * * *shall be allowed and paid*, on the presentation of itemized vouchers therefor approved by the Chairman of the Commission, * * * ."

Under that Act, the duty was peremptorily laid upon the disbursing agent to pay all claims presented to him, where the voucher was itemized, and was approved by the Chairman.

Under the rule of the Comptroller, the disbursing officer is denied credit in his accounts for all disbursements for official telegrams, unless his vouchers for such dis-

bursements are accompanied by the original telegrams or copies thereof, or a certificate by the Chairman of their confidential character.

The disbursing agent has shown, as stated above, why compliance with this requirement is altogether beyond his power.

If the Act of Congress had provided that in addition to the "itemized vouchers" and the "approved by the Chairman," there should also be the original telegrams, or the copies thereof, or the certificate of the Chairman, then the disbursing officer would not have been warranted in making the disbursement in the absence of these essential features. But Congress had not made this requirement. It has prescribed plainly the "ear-marks" by which the disbursing agent might know the claims he was authorized and directed to pay. The Comptroller has added these further exactions; and by so doing has said to the disbursing agent—although you may pay the claims which bear the ear-marks which Congress has prescribed, yet will I deny to you credit for such disbursements, unless you add to these the further badges which I have prescribed. The disbursing agent is thus placed in this embarrassing predicament: He is compelled to disburse under the Act of Congress, but he is denied credit for such disbursements under the Act of the Comptroller.

In the brief for the United States, the case of United

States v. Fletcher, 147 U. S., 664, is relied on as sustaining the reasonableness of this requirement. But it is manifest that this arises from a misapprehension of that case, which holds that where a claim is presented against the Government and is pending in the Department out of which it is arisen—whether for further proof or for other reasons, the Court should not be called on to interfere. But that does not warrant that Department in adding to the burden of proof other and further requirements than those which are prescribed by law. It certainly does not warrant the auditing officers of the Government in setting at naught the Act of Congress, because in the opinion of these officers, Congress had not gone far enough in its specification of the proper requirements.

It might be enough to say in reply to the view urged in the Government's brief, that although the Court of Claims thought that the requirement was reasonable, yet did it also decide that the claimant had fully complied with it. And yet, despite this solemn adjudication by a Court competent and charged with the duty of deciding the case, the Comptroller, when the identical state of facts between the same parties came again before him for his official action, ignored and repudiated the authority of the Court, as he had by his rule ignored and repudiated the Act of Congress.

This Court cannot take judicial notice of the many and flagrant instances, in which the official action of the Comptroller is impairing and obstructing the operation of the Executive Departments of the Government, by a zeal untempered by discretion, but it may not be improper to invite its attention to the recent opinion of Judge Lowell of the United States District Court for Massachusetts, in the case of Lovering v. The United States, as to the general conduct of business in the Comptroller's office.

> "In going through the numerous items, the Court has been greatly assisted by the discrimination of the assistant district attorney. It is to be regretted that the Comptroller is without the advice of some lawyer like him, of competent knowledge and common sense. Such advice would save honest creditors of the United States from disheartening delay, and the Court from a burden of needless litigation.
>
> "The Government is not protected from unjust claims by the postponement and refusal of payment on technicalities of which a private employer would not avail himself. Like any method which savors of sharp practice, this practice does not protect the Government from ill-founded claims, but rather be-

gets them, and soon becomes more costly than that prompt discharge of liabilities that is practised among business men."

On the whole case, then, as presented in the record, it is respectfully submitted that the rule of the Comptroller requiring the disbursing agents of the Executive Departments of the Government to exhibit with their vouchers for disbursements for official telegrams, the originals, or copies of such telegrams, or, if confidential, the certificate of the head of the department, as to their confidential character, is unwise, unreasonable, and impracticable, and, as to the disbursing agent of the Interstate Commerce Commission, is altogether unwarranted by law, and directly in violation of the statute, by which his duties are defined and imposed.

HOLMES CONRAD,
for Appellee.